Supreme Court, U.S.
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No. 97-1153

In The

Supreme Court of the United States

October Term, 1997

DREW CASS,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of New York

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

DID THE SENTENCING COURT VIOLATE DEFENDANT'S RIGHT TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS WHEN IT SENTENCED HIM TO A TERM OF INCARCERATION RATHER THAN A BARGAINED-FOR PERIOD OF COMMUNITY SERVICE?

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent respectfully requests that this Court deny the Petition for a Writ of Certiorari, seeking review of the New York State Court of Appeals' Certificate denying Petitioner's application for leave to appeal to that Court.

OPINONS BELOW

The opinions rendered by the State Courts have not been reported. However, the Certificate of Chief Judge Judith S. Kay of the Court of Appeals of the State of New York, dated August 29, 1997, denying Petitioner leave to appeal to that Court is reproduced in Petitioner's Appendix as Exhibit A (A.1). Similarly, the Order and Memorandum Decision of the Appellate Term of the Supreme Court of the State of New York, dated May 2, 1997, dismissing Petitioner's appeal to that Court is reproduced in Petitioner's Appendix as Exhibit B (A.2-A.4).

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. section 1257(a) and claims he has been denied his right to due process of law under the Fifth and Fourteenth Amendments to the Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States
Amendment V

"No person shall be – deprived of life, liberty or property, without due process of law."

Constitution of the United States
Amendment XIV

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

New York *Criminal Procedure Law*, section 220.60, subd. 3 provides as follows:

"At any time before the imposition of sentence, the court in its discretion may permit a defendant who has entered a plea of guilty to the entire indictment or to part of the indictment, or a plea of not responsible by reason of mental disease or defect, to withdraw such plea, and in such event the entire indictment, as it existed at the time of such plea, is restored."

New York *Criminal Procedure Law*, section 440.10, subd. 1(h) provides as follows:

"At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that:

(h) The judgment was obtained in violation of a right of the defendant under

> the constitution of this state or of the United States."

New York *Criminal Procedure Law*, section 380.50, subd. 1, provides, in pertinent part, as follows:

> "At the time of pronouncing sentence, the Court must accord the prosecutor an opportunity to make a statement with respect to any matter relevant to the question of sentence. . . . "

STATEMENT OF THE CASE

Petitioner was charged in the District Court of Suffolk County with two Violations of Probation (New York *Criminal Procedure Law*, section 410.30); one count of Offering a False Instrument for Filing in the Second Degree (New York *Penal Law*, section 175.30); and four violations of the *Brookhaven Town Code*.

On October 23, 1995, Petitioner appeared with his attorney before the Honorable Ira P. Block and, after a conference with the District Attorney, was permitted to plead guilty to one of the Violation of Probation counts [Docket #3295432] and to the charge of Offering a False Instrument for Filing in the Second Degree (A.6-A.10).[1] It was understood and agreed tl.at the remaining charges against Petitioner, including the second Violation of Probation charge and all the *Brookhaven Town Code* violations, would be dismissed in satisfaction; that Petitioner would be sentenced to 30 days of community service *if found to be eligible*, and that probation would be restored (A.6-A.10).

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[1] Refers to the page numbers of Petitioner's Appendix.

A probation report was ordered and sentencing was adjourned to January 4, 1996 (A.10).

On January 4, 1996, the matter was adjourned by Judge Block to February 15, 1996 because of the illness of Petitioner's Probation Officer (A.32-A.33). However, according to a Probation Department representative who was present, both the Suffolk County Citizen's Affairs Bureau and the Town of Brookhaven had put a considerable amount of time and effort into this matter and the authorities were hoping for a more substantial sentence to be imposed than that which had been promised (A.33). The Court recognized the representative's consternation, but stated that a plea had been taken and a sentencing commitment made (A.33).

On February 15, 1996, Harold A. Steuerwald, Esq., Assistant Town Attorney of the Town of Brookhaven, appeared before the Court and advised Judge Block that Petitioner was a persistent violator of the *Town Code*; that the Town of Brookhaven was not a party to any plea-bargaining agreement in this case; that the Town had not authorized the taking of a disposition; that the Town was not even present on October 23, 1995 when Petitioner agreed to take a plea; that the Town was unalterably opposed to the dismissal of all the Town charges; and that at the very least, the Town would insist on a guilty plea to at least one of the Town charges (A.12-A.15).[2]

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[2] A Court is without jurisdiction to take a plea to a reduced charge in the absence of the appropriate prosecutor's consent. *Matter of Blumberg v. Lennon*, 44 A.D.2d 769 (Fourth Department, 1974); *Matter of Cosegrove v. Kubiniec*, 56 A.D.2d 709, 710 (Fourth Department, 1977); *Matter of Hinrelein v. Nenno*, 168 A.D.2d 957, 958 (Fourth Department, 1990).

Following a conference with Mr. Steuerwald, Petitioner was permitted to plead guilty to violating section 51-1C of the *Brookhaven Town Code* (one count) in that as an owner of premises at 2585 Route 25, Centereach, New York, Petitioner allowed various appliances consisting of washers, dryers and refrigerators to be stored outside on the northern portion of his property (A.15-A.18).

Thereupon, Judge Block reviewed an updated probation report; observed that he could not go along with community service in any of these cases; and stated the following on the record:

> "Mr. Cass (Petitioner) is a wonderful person. He has done things to prove that the pen is mightier than the sword. He has to go to jail. That's what it boils down to. Thirty days in the Suffolk County Jail. No community service. I want you to understand that. He will understand because I said it now for purposes of the record. He has lived his life. For the next three years he will be mine. If he continues along his merry way, that's what it boils down to. This is an updated report. Sentence date was February 15, 1996, which is today. Would you like to see this Counselor, you are welcomed to review it. That's what I see so far. I'm not interested in community service.
>
> MR. KOSAK (Petitioner's counsel): Okay. Would it be possible to address start of the jail term?
>
> THE COURT: No. Today is the day he goes in." (A.13)

At defense counsel's request, the matter was adjourned to February 20, 1996 (A.20).

On February 20, 1996, new counsel appeared for the Petitioner and requested a conference with Judge Block (A.25). The Court advised counsel he could have a conference, but that the Court was cognizant of the dilatory tactic and that one way or the other Petitioner was going to be remanded (A.25).

After the conference, when Petitioner was asked if there was any just cause or reason why sentence could not be imposed, counsel indicated his client was ready to be sentenced and that he would rely upon the just concluded conference with the Court (A.27).

When asked if he'd like to address the Court prior to the imposition of sentence, defendant indicated he had read the probation report and was remorseful (A.28). The Court noted, however, that it had never known anyone about to be sentenced who did not feel a certain amount of remorse (A.28).

It further appears that Petitioner has a legal history dating back to 1976; that he has been subject to various fines over the years; that he has been subject to a conditional discharge; and that he has been placed on probation in 1988, 1990 and 1993 (A.28). Judge Block then commented as follows:

> "I believe you earned a certain period of incarceration. At this point, it's time for you to understand that a constant movement by you to flaunt the Law cannot be permitted. Whether the Law involves Citizens Affairs or involves the Town of Brookhaven or County of Suffolk or the State of New York. Each of these entities is entitled to have their rules, regulations and Laws obeyed. Perhaps we have gone through

> twenty years of your life without imposing a restriction in your liberties, and that has allowed you to feel that you could flaunt the Law. There is a time this comes to an end." (A.28)

Thereupon, the Court proceeded to sentence Petitioner as follows: Leaving Various Appliances Outside – 15 days in the Suffolk County Jail; Violation of Probation – 30 days in the Suffolk County Jail; Offering a False Instrument for Filing – 30 days in the Suffolk County Jail. The sentences were directed to be served concurrently (A.28-A.29).

At no time prior to the imposition of sentence on February 20, 1996 did Petitioner ever move to withdraw his guilty pleas, pursuant to New York *Criminal Procedure Law*, section 220.60, subd. 3, on the ground that the Court was about to break its "plea-bargaining agreement"; nor did Petitioner ever object to the sentences that were actually imposed by Judge Block; nor did Petitioner ever move to set the judgments of conviction aside, pursuant to *Criminal Procedure Law*, section 440.10, subd. 1(h), on the ground that his constitutional rights had been violated.

On May 2, 1997, the Appellate Term of the Supreme Court of the State of New York dismissed Petitioner's appeal to that Court on the ground that since Petitioner was, in essence, questioning the harshness of the sentences that had been imposed and since the sentences had actually been served by Petitioner, any question as to their propriety was moot (A.2-A.4).

And, on August 29, 1997, Chief Judge Judith S. Kaye denied Petitioner's application for leave to appeal to the

New York Court of Appeals certifying that no question of law had been presented by Petitioner requiring review by the Court of Appeals (A.1).

REASONS FOR DENYING THE PETITION

A. PETITIONER'S CLAIM THAT THE SENTENCING COURT VIOLATED HIS RIGHT TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS WHEN IT SENTENCED HIM TO A TERM OF INCARCERATION RATHER THAN A BARGAINED-FOR PERIOD OF COMMUNITY SERVICE HAS NOT BEEN PRESERVED FOR REVIEW BY THIS COURT.

It is settled law that any sentencing promise at the time of plea is, as a matter of law and strong public policy, conditioned upon its being lawful and appropriate in the light of the subsequent presentence report or information obtained from other reliable sources. [*People v. Selikoff*, 35 N.Y.2d 227, 238 (1974), *cert. den.*, 419 U.S. 1122 (1974); *People v. Ifill*, 108 A.D.2d 202, 204 (Second Department, 1985); *People v. Grant*, 99 A.D.2d 536 (Second Department, 1984)] and the fact that Judge Block in the instant case did not explicitly condition his promise upon his later evaluation of the presentencing report is of no consequence [*People v. Selikoff, supra* at p. 238]. Indeed, the implication is apparent from the record that 30 days of community service would be imposed *only* if Petitioner was found to qualify for it in the first instance (A.10). *People v. Selikoff, supra* at p. 238.

Here, Judge Block's examination of Petitioner's presentence report reveals that Petitioner did not qualify for

community service; that he had a legal history dating back to 1976; that he had been subjected to various fines over the years; that he had once before been subjected to a conditional discharge; and that he had been placed on probation in 1988, 1990 and 1993 (A.28). The opportunity which allowed Petitioner to flaunt the law with impunity in the past had obviously come to an end (A.28).

Thus, Petitioner's presentence report provided a sufficient basis for Judge Block to refuse to abide by his original promise of community service and, instead, to impose a term of incarceration in its place. *People v. Ifill, supra* at p. 204; *People v. Grant, supra* at p. 536 [citing with approval *People v. Selikoff*, 35 N.Y.2d 227, 338]. Petitioner, of course, has no constitutional right to a plea-bargain. *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977); *People v. Peterson*, 91 Misc.2d 407, 410 (Supreme Court, Bronx County, 1977).

The fact that the Community Service Program of Suffolk County found Petitioner to be "eligible" for Community Service is also of no consequence. Sentencing is primarily a judicial responsibility [*People v. Selikoff, supra* at pp. 240-241; *People v. Farrar*, 52 N.Y.2d 302, 305-308 (1981)] and, while entitled to consideration, the recommendation of the Community Service Program was not binding upon Judge Block who properly rejected it as being inadequate (A.13, A.28). *People v. Arogundy*, 112 A.D.2d 1003, 1004 (Second Department, 1985); *People v. Semkus*, 122 A.D.2d 287, 288 (Second Department, 1988).

Pursuant to New York *Criminal Procedure Law*, section 220.60, subd. 3, a motion to withdraw a guilty plea is

addressed to the sound exercise of the trial court's discretion [*People v. Stubbs*, 110 A.D.2d 725, 727 (Second Department, 1985); *People v. Kelsch*, 96 A.D.2d 677, 678 (Third Department, 1983)] and must be supported by a showing that defendant has been deprived of some basic right. In short, withdrawal is not to be had merely for the asking [Preiser, Practice Commentary, McKinney's Cons. Laws of New York, Book 11A, CPL 220.60, subd. 3, p. 110].

Here, no timely or appropriate motion to withdraw defendant's pleas was made either on February 15, 1996 [when it became apparent that Judge Block was not going to sentence defendant to community service] or on February 20, 1996 [the date of actual sentence]. And, of course, no showing was ever made that defendant had been deprived of some basic right.

Indeed, at sentencing on February 20, 1996, when asked if there was any just cause or reason why sentencing could not then be imposed, defense counsel replied: "No" (A.27). And, when asked if he had anything to say prior to the imposition of sentence, Petitioner merely stated he was remorseful (A.27-A.28).

Thus, Petitioner's failure at the time his sentence was imposed to either object to the sentence or to move to have his pleas withdrawn precluded the New York Appellate Courts from reviewing Petitioner's claim that Judge Block failed to abide by his sentencing promise, especially where, as here, the sentences actually imposed were neither illegal or excessive and intervention in the interest of justice was unwarranted. *People v. Lanterman*, 194 A.D.2d 630 (Second Department, 1993); *People v. Delrosa*, 188 A.D.2d 486 (Second Department, 1992); *People*

v. Warren, 187 A.D.2d 475 (Second Department, 1992) and *People v. Burton*, 133 A.D.2d 276, 277 (Second Department, 1987).

Moreover, by failing to object to his plea and sentence in the trial court by motion to vacate [New York *Criminal Procedure Law*, section 440.10, subd. 1(h)] or otherwise, Petitioner has failed to preserve the claim that the sentences imposed violated his rights under the Fifth and Fourteenth Amendments. *Parker v. North Carolina*, 397 U.S. 790, 798 (1970); *Edelman v. California*, 344 U.S. 357, 358 (1952).

Thus, in *Parker v. North Carolina, supra*, the question arose as to whether the Indictment to which Parker pleaded guilty was invalid because members of his race were allegedly systematically excluded from the Grand Jury which returned the Indictment. The North Carolina Court of Appeals refused to consider the claim since under North Carolina law an objection to the composition of the Grand Jury must be made by a motion to quash in the trial court prior to the entry of the guilty plea. Because Parker had failed to raise his objection in timely fashion, relief was unavailable. In affirming Parker's conviction for first degree burglary, this Court, per Justice White, declined to consider the issue regarding the selection of the Grand Jury since the state rule of practice relied on by the North Carolina Court of Appeals constituted an adequate state ground precluding review by the Supreme Court..

Similarly, in *Edelman v. California, supra*, Edelman was tried and convicted in a state court on a charge of vagrancy. He appealed and contended for the first time in

the California appellate court that the vagrancy statute was unconstitutionally vague. However, the Appellate Court affirmed the conviction. Thereafter, Edelman petitioned this Court for certiorari contending again that the vagrancy statute was invalid for vagueness. In an opinion by Justice Clark, the Court determined that the validity of the California statute was not properly before the Court because the issue had not been timely raised in the trial court.

To the same force and effect as the cases discussed above are: *Herndon v. Georgia*, 295 U.S. 441, 442 (1934) [Constitutional question not considered since the issue was not timely presented in the state courts]; *Hulbert v. Chicago*, 202 U.S. 275, 279-280 (1906) [Constitutional claims were never presented to state trial court thereby precluding review by the U.S. Supreme Court]; *Mutual Life Insurance Co. v. McGrew*, 188 U.S. 291, 308-309 (1903) [Where constitutional claims were not raised in state trial court, Supreme Court declined to review].

Similarly, Petitioner's claim that Mr. Steuerwald's "intervention" in this matter violated his Fifth and Fourteenth Amendment rights to due process was never presented to the state courts – either at the trial level or the appellate level. Hence, under the authorities cited above, the Court should decline to review the issue. In any event, the record reveals that Petitioner pleaded guilty to violating section 51-1C of the *Brookhaven Town Code* (one count) (A.18); that Mr. Steuerwald was an Assistant Town Attorney (A.11); and, that he (Steuerwald) had every right and duty to make his position known to the Court (A.14). See also, New York *Criminal Procedure Law*, section 380.50, subd. 1.

B. PETITIONER ALLEGES NO COMPELLING REASON FOR GRANTING CERTIORARI.

Neither the Appellate Term of the State of New York nor the New York Court of Appeals has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals.

Nor has the Appellate Term of the State of New York nor the New York Court of Appeals decided an important question of federal law that should be settled by this Court.

Moreover, neither the Appellate Term nor the New York Court of Appeals has decided an important question of federal law that conflicts with relevant decisions of this Court.

Finally, the determination of the New York Courts in this case turns upon its own particular facts and will affect few others than the actual litigants themselves. Furthermore, the law favors the finality of criminal convictions, particularly those based upon pleas of guilty. *McMann v. Richardson*, 397 U.S. 759, 773-774 (1970); *People v. LaRuffa*, 34 N.Y.2d 242, 245 (1974). In view of the fact that Petitioner has failed under 28 U.S.C. section 1257(a) to properly raise a substantial federal question warranting review by this Court, his pleas and convictions in New York should become final.

CONCLUSION

BASED UPON THE FOREGOING, THE PETITION FOR CERTIORARI SHOULD BE DENIED.

DATED: Riverhead, N.Y.
January 26, 1998

Respectfully submitted,

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